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No. 96-643 (19)

IN THE

Supreme Court of the United States

October Term, 1996

THE STEEL COMPANY, a/k/a CHICAGO STEEL AND PICKLING COMPANY,

Petitioner,

-v.-

CITIZENS FOR A BETTER ENVIRONMENT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF NEW YORK, CONNECTICUT, DELAWARE, GEORGIA, HAWAII, INDIANA, MASSACHUSETTS, MISSOURI, NEW HAMPSHIRE, NORTH CAROLINA, OKLAHOMA, VERMONT, VIRGINIA, WEST VIRGINIA AND THE TERRITORY OF GUAM IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

The States submit this brief pursuant to Rule 37 of the Rules of the Supreme Court in support of the respondent, Citizens For a Better Environment ("CBE"), and its efforts to enforce the Emergency Planning and Community Right-to-Know Act, ("EPCRA"), an environmental reporting statute intended to provide the public with information on the presence and release of hazardous substances in the community. The *amici curiae* States appear through their respective Attorneys General who are responsible for enforcement of certain reporting requirements under EPCRA. The *amici curiae* States urge affirmance of the decision of the court below.

This case involves the failure of the petitioner, The Steel Company, to file annual hazardous chemical inventory and toxic chemical release forms (hereinafter "chemical inventory and release forms") for eight years in repeated violation of EPCRA Sections 312 and 313, 42 U.S.C. §§ 11022 and 11023. These chemical inventory and release forms advise the community of the presence and release of hazardous substances and enable planning and preparation for emergencies.

The reporting requirements of EPCRA Sections 312 and 313 are designed to provide crucial information annually to State and local governments and the public on which they may rely in making decisions. States have a strong interest in assuring that timely information on the presence and release of hazardous substances is filed and available to communities, to emergency planners and responders, and to State and local environmental regulators. The States therefore have a strong interest in assuring strict compliance with the reporting requirements of Sections 312 and 313.

The States' interest would be adversely affected by a reversal of the decision of the court below because compliance incentives for facilities subject to EPCRA's reporting requirements would be eliminated. If facilities can "cure" violations by simply filing years late and thereby prevent penalties and injunctive relief from being imposed, facilities may not comply with the reporting requirements at all until enforcement is sought.

The outcome of this case will affect not only compliance, but also the States' ability to enforce EPCRA's requirements effectively. If citizens may not enforce EPCRA Section 313, 42 U.S.C. § 11023, once a facility belatedly files, enforcement efforts will be seriously compromised and the public health jeopardized because hazardous chemical releases will not be disclosed. Moreover, given the structure of EPCRA which requires the States to utilize the citizen suit provision, Section 326(a)(2), 42 U.S.C. § 11046(a)(2), when seeking to enforce Section 313 violations, this Court's construction of the citizen suit provision will dictate the extent to which State regulatory agencies and Attorneys General throughout the United States may enforce chemical release reporting violations under Section 313. Thus, States have a significant interest in the determination reached here.

Citizen enforcement efforts are a necessary and welcome complement to the enforcement efforts of federal, State and local regulatory agencies whose resources are limited. Tens of thousands of facilities are subject to EPCRA's reach and detection and prosecution of all violators by the Environmental Protection Agency ("EPA") is virtually impossible. Citizen enforcement is a necessary component of the regulatory scheme. States have an interest in maximizing EPCRA compliance and in attaining its goals through citizen enforcement efforts. The

determination of the court below, which implicitly addressed the foregoing State interests, should be affirmed.

SUMMARY OF THE ARGUMENT

1. The express language of EPCRA Section 326(a)(1) authorizes a civil action by "any person" for a facility's failure to comply with the procedural and substantive requirements of EPCRA's reporting provisions. Section 326(a)(1) expressly provides that suit may be commenced for a facility's "failure to . . . complete and submit" chemical inventory and release forms as required "under" Sections 312 and 313. 42 U.S.C. § 11046(a)(1)(A)(iii) and (iv). These forms are statutorily required to be filed every year by March 1 and July 1, respectively. 42 U.S.C. § 11022(a)(2) and 42 U.S.C. § 11023(a). The failure to file the forms by the deadlines noted in Sections 312 and 313 constitutes violations subject to a citizen suit. A citizen suit may be maintained for injunctive relief, penalties and attorneys' fees against a facility failing to strictly comply with Sections 312 and 313. Section 326(c) gives the district court jurisdiction to award such relief in a citizen suit.

2. EPCRA's citizen suit provision is entirely different than the citizen suit provision in the Clean Water Act ("CWA"), 33 U.S.C. § 1365. The primary differences are found in EPCRA's statutory purpose of protecting communities in which facilities are located, in the defined reporting deadlines, and in the language of the citizen suit provision which is not cast in the present tense, unlike the CWA's citizen suit provision. The court below thoroughly analyzed these differences and properly concluded that a citizen suit could be maintained for wholly past violations.

3. The legislative history of EPCRA reflects the Congressional intent to promote strict compliance with EPCRA's annual filing deadlines and with its other substantive requirements. Congress found unacceptable the risks to communities from chemical exposure and emergencies, and intended to prevent such risks through enforcement of strict compliance with EPCRA.

4. EPA, the federal agency responsible for administering EPCRA, does not consider late filing to constitute "current compliance" or to cure violations. EPA interprets Section 313 to require *timely* annual filing of required reports and treats a facility's "failure to report at all" in the same fashion as a facility's "failure to timely report." EPA considers both to be violations of EPCRA punishable by civil penalties and injunctive relief. EPA's interpretation is consistent with the protective goals of the statute and is entitled to great weight and deference.

5. State and citizen enforcement efforts would be seriously undermined if suit cannot be maintained against a facility that continually fails to comply with EPCRA's reporting requirements. There are strong public policy reasons for providing citizens with the ability to seek redress. The imposition of prospective injunctive relief and penalties compels compliance not only by the violating facility but by other facilities subject to EPCRA's requirements. Absent a legal consequence imposed as a result of non-compliance, facilities subject to EPCRA's requirements will have no incentive to comply. Citizen suits supplement and complement State and federal enforcement efforts. Citizen enforcement is critical to EPCRA's purpose, which is the protection of public health. Congress intended to give enforcement authority to a wide-ranging class of plaintiffs, including citizens, in order to assure the comprehensive

protection of communities in which hazardous chemicals are present and released.

6. CBE's complaint presents a "case or controversy" and CBE has standing to maintain a civil action for The Steel Company's failure to file annual chemical inventory and release forms by the dates set forth in EPCRA Sections 312 and 313. In the context of a motion to dismiss, the allegations in CBE's complaint are deemed true. These allegations sufficiently set forth a basis for standing. CBE's complaint alleges that both CBE and its members have been placed at risk and harmed by The Steel Company's failure to report. Specifically, the complaint alleges that CBE uses EPCRA data reported by facilities in its programmatic activities and (1) reports to its members and the public about the storage and release of toxic chemicals to the environment; (2) advocates changes in environmental laws; and (3) seeks reduction of toxic chemicals and effective enforcement of environmental laws. CBE members have been exposed to releases of hydrochloric acid (also known as hydrogen chloride) and other hazardous chemicals, and were entitled to know of the releases and to make decisions and choices with respect to their exposure. CBE members reside in a community in which the emergency planners and responders lacked adequate information to protect the community and the public health in the event of an emergency. CBE has drained its resources by investigating, researching and otherwise pursuing The Steel Company's chemical inventory and release information that should have been readily available. CBE has a risk of future injury because The Steel Company's past violations indicate a likelihood of future violations. CBE injury will be redressed by the relief requested in the complaint. Future violations will be deterred and CBE's resources will not be expended in pursuing

information that is required as a matter of law to be filed under EPCRA.

ARGUMENT

POINT I

CBE'S CITIZEN SUIT IS EXPRESSLY AUTHORIZED BY EPCRA SECTION 326(a)

A. Express Language of Section 326(a)

CBE's citizen suit against The Steel Company is expressly authorized by EPCRA Section 326(a) for the company's failure to file chemical inventory and release forms for eight years. Under Sections 312 and 313, chemical inventory and release forms must be filed by specific deadlines every year. 42 U.S.C. §§ 11022(a) and 11023(a) and (g). The failure to meet these deadlines constitutes a violation which, under the express statutory language of Section 326(a), may be subject to a citizen suit. 42 U.S.C. § 11046(a). Section 326(a) authorizes a citizen suit against a facility "for failure to . . . complete and submit" hazardous chemical inventory forms by March 1 every year, and "for failure to . . . complete and submit" toxic chemical release forms by July 1 every year.

More specifically, "any person" may commence a civil action against a facility for failure, inter alia, to complete and submit to the State Emergency Response Commission ("SERC"), the Local Emergency Planning Committee ("LEPC") and the local fire department:

1. hazardous chemical inventory forms identifying the nature, quantity and location of chemicals at the

facility on or before March 1, 1988 and annually thereafter, as required under Section 312(a) and (d), 42 U.S.C. § 11022(a) and (d); and

2. toxic chemical release forms for each chemical manufactured, processed or otherwise used at and released from the facility in amounts exceeding threshold quantities on or before July 1, 1988 and annually thereafter, as required under Section 313(a), 42 U.S.C. § 11023(a).

See, 42 U.S.C. § 11046(a)(1).[1]

Prior to commencing a citizen suit, 60 days' notice of the violation must be given to the EPA, the State and the violating facility. Section 326(d), 42 U.S.C. § 11046(d). A citizen suit may not be commenced if EPA is "diligently pursuing" an administrative order or civil action to enforce the requirements of EPCRA or to impose civil penalties. 42 U.S.C. § 11046(e).

State or local governments are authorized to commence a civil action against a facility for the failure to submit, among other things, Section 312 hazardous chemical inventory forms to the State, the SERC, the LEPC, or local fire department. *See*, 42 U.S.C. § 11046(a)(2)(A)(iv). A State or local government need

[1] Citizens are also authorized to sue a facility for failing to provide follow-up emergency notification of a release of an extremely hazardous substance "as soon as practicable" after the release, as required by Section 304(c), 42 U.S.C. § 11004(c), and for failure to submit material safety data sheets for each hazardous chemical at the facility as required by Section 311(a), 42 U.S.C. § 11021(a). Citizens may also sue EPA, a State, or a SERC for failing to make reporting information available to the public or to respond to a request by the public for detailed Section 312 chemical inventory information. *See*, 42 U.S.C. § 11046(a)(1)(B), (C) and (D).

not give 60 days' notice to the violating facility under this provision. If a facility fails to submit a Section 313 toxic chemical release form, however, as The Steel Company failed to do here, State and local enforcement authorities must sue as "persons," utilizing the citizen suit provision of Section 326(a)(1), 42 U.S.C. § 11046(a)(1), and are subject to the 60-day notice requirement.[2]

Under the express terms of Section 326(c), the district court has jurisdiction in any civil action brought under Section 326(a) to grant the following relief:

1. Enforce the requirements of EPCRA; and

2. Impose a civil penalty for violation(s) of the requirement(s); and

3. Award costs, including attorneys fees and expert witness fees, to the prevailing party.

See, 42 U.S.C. § 11046(c) and (f). This is the full range of relief to which a "person," including a citizen, a State or local government, a SERC or an LEPC, is entitled in a suit brought under Section 326(a), 42 U.S.C. § 11046(c) and (f). Clearly, this is the relief to which CBE is entitled here.

The court below exhaustively analyzed the differences between the language of EPCRA's citizen suit provision and the language of the Clean Water Act's ("CWA's") citizen suit provision as construed by this Court in *Gwaltney of Smithfield,*

[2] "Person" is defined in EPCRA to include State and local governments. *See*, 42 U.S.C. § 11049(7).

Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987). This Court in *Gwaltney* held that a citizen suit must allege that a facility is "in violation," meaning that it is in continuous or intermittent violation of a permit and is discharging contaminants unlawfully. *Gwaltney*, 484 U.S. at 57. This Court viewed the pervasive use of the present tense in the CWA to mean that Congress intended a citizen suit to be authorized only for "continuous or intermittent" violations. 484 U.S. at 59. Unlike the CWA, however, EPCRA's citizen suit provision is not cast in the present tense and its language authorizes a citizen suit for past violation.

Section 326(a) authorizes an action for a facility's "failure to . . . complete and submit" chemical inventory and release forms required "under" Sections 312 and 313. Compliance with Sections 312 and 313 requires not only that specific substantive information[3] be submitted to State and local emergency responders and be made available to the public, [*see*, 42 U.S.C. §§ 11022(a)(2); 11022(e); 11023(a); 11023(h)], but that the information be submitted *by a specific date each year*. *Citizens For a Better Environment v. The Steel Company*, 90 F.3d 1237, 1243 (7th Cir. 1996), *cert. granted*, 117 S.Ct. 1079 (1997) ("[t]hese [filing deadlines] are not guidelines or suggestions; they are essential elements of the provisions citizens have authority to enforce").

The most natural reading of the phrase "failure to . . . complete and submit [chemical inventory and release forms] . . .

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[3] The substantive requirements of Sections 312 and 313 provide that annual chemical inventory and release forms include, among other things, the nature, quantity and location of hazardous chemicals at the facility, and an assessment of the amount of releases of such substances to the environment. 42 U.S.C. §§ 11022(d) and 11023(g).

under" Sections 312 and 313, is that a citizen plaintiff may sue for a facility's past violations despite attempts to "correct" violations by late filing. This reading makes sense because once the annual deadlines have been missed, adverse impacts have occurred which cannot be corrected. The court below properly concluded that Section 326(a) authorizes a citizen suit for a facility's failure to file by the date noted in the statute and that late filing is insufficient to constitute compliance. 90 F.3d at 1243.[4]

The Steel Company has consistently asserted that once it belatedly filed eight years of reports, it was "in compliance" and no citizen suit could be maintained for past violations, referring to this Court's holding in *Gwaltney*, 484 U.S. at 59. This proposition was rejected by the court below, 90 F.3d at 1244, and should be rejected here. Prompt receipt of the information every year by SERCs, LEPCs, and local fire departments, and its availability to the public, is crucial to achieving EPCRA's purposes of emergency planning and community right-to-know.[5]

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[4] The court below also referred to the use of the past tense in the venue provision of Section 326(b)(1), 42 U.S.C. § 11046(b)(1), which provides for a citizen suit to be commenced in the district "in which the alleged violation occurred." 90 F.3d at 1244. This provision is cast in the past tense and is consistent with the reading of Section 326(a) that would authorize suits for past violations.

[5] The complaint alleges that in failing to file chemical inventory and release forms, The Steel Company failed to disclose to State and local emergency planners and responders and to the public the presence and release of hydrochloric acid (JA 5-6), an "extremely hazardous substance" that poses a significant health risk from exposure. This information was crucial to CBE's members in reaching decisions regarding where they chose to live and work in order to avoid exposure to an established health risk. This information was also crucial to CBE in its associational role of educating the public about chemicals in the community, developing plans for emergency preparedness, and attempting to reduce toxic chemicals where its members live, work and visit (JA 5).

Congress would not have included the specific annual deadlines of March 1 in Section 312(a) and July 1 in Section 313(a) if that filing requirement could be ignored. The Steel Company was not "in compliance" when it belatedly filed eight years of reports.

As this Court has repeatedly stated, "the starting point for interpreting a statute is the language of the statute itself." *Gwaltney*, 484 U.S. at 56; *Hallstrom v. Tillamook County*, 493 U.S. 20, 25 (1989); *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Absent a clearly expressed legislative intention to the contrary, the words of the statute are conclusive. *Hallstrom*, 493 U.S. at 28; *GTE*, 447 U.S. at 108. The Court need not proceed beyond the express language of Sections 326, 312 and 313 to conclude that a citizen suit is authorized for repeated past violations.

B. EPCRA's Legislative History

Although EPCRA's language is unambiguous and the Court need not go beyond the words of the statute, its legislative history further supports this reading of Section 326(a), 42 U.S.C. § 11046(a). EPCRA's purpose as a "community right-to-know" statute was stated by one of its principal architects to be as follows:

> First, Congress recognizes a compelling need for more information about the Nation's exposure to toxic chemicals. Until now, the success of regulatory programs . . . has been impossible to measure because no broad-based national information has been compiled to indicate increases or decreases in the amounts of toxic pollutants entering our environment. The reporting requirements and the [Section 313] toxic chemical release forms in particular, are intended to provide this national

> information. As a result, the reporting provisions in this legislation should be construed expansively to require the collection of the most information. . . .
>
> A second major principle of this program is to make information regarding toxic chemical exposure available to the public, particularly to the local communities most affected. For too long, the public has been left in the dark about its exposure to toxic chemicals. Information that has been available under existing environmental statutes, . . . has been difficult to aggregate and interpret, which has made it difficult, if not impossible, for the public to gain an overall understanding of their toxic chemical exposure. Consequently, the reporting re-quirements should be construed to allow the public the broadest possible access to toxic chemical information in formats that are straightforward and easy to understand.

See, 132 Cong. Rec. H9593-94 (daily ed. October 8, 1986) (Statement of Rep. Edgar), *reprinted in* Senate Committee on Environment and Public Works, *A Legislative History of the Superfund Amendments and Reauthorization Act of 1986*, Vol. 6, pp. 5313-14 (Comm. Print 1990).

The legislative history also indicates a Congressional intent to enforce strictly the deadlines delineated in the statute. Reporting must be "swift and complete" and the requirements of the statute "must be strictly and strenuously enforced." *See, supra*, 132 Cong. Rec. at H9593 (Statement of Rep. Sikorski).

C. EPA'S Interpretation of EPCRA

EPA is the federal agency responsible for administering EPCRA along with SERCs, LEPCs and local fire departments.

Like the court below, EPA views late filing of Section 313 chemical release forms as a violation of EPCRA subject to enforcement and the imposition of civil penalties. *See,* EPA, Office of Compliance Monitoring, *Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to-Know Act of 1986 and Section 6607 of the Pollution Prevention Act of 1990* (1992).

EPA's policy does not allow a facility to "correct" its violations through late filing. EPA views late filing as non-compliance subject to enforcement. Enforcement by a citizen suit under Section 326(a) for Section 313 reporting violations is implicit in EPA's policy. This is precisely the enforcement CBE seeks here. As the federal agency responsible for administering EPCRA, EPA's interpretation of what constitutes non-compliance for purposes of enforcement is entitled to great weight and deference. *See, Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984). The reading of Section 313 by the court below and its conclusion that citizens may sue for past violations is fully consistent with EPA's policy, unlike the Sixth Circuit's decision in *Atlantic States Legal Foundation v. United Musical Instruments USA, Inc.*, 61 F.3d 473, 475-77 (6th Cir. 1995) (late submission of Section 313 chemical release forms constitutes compliance and is not equivalent to a complete failure to submit such forms).

POINT II

STATE AND CITIZEN ENFORCEMENT OF EPCRA WOULD BE UNDERMINED IF AN ACTION MAY NOT BE MAINTAINED FOR REPORTING VIOLATIONS

State and citizen enforcement of EPCRA would be seriously undermined if suit may not be maintained against a facility that continually fails to comply with annual reporting requirements. There are strong public policy reasons that favor both a citizen's and a State's right to seek an injunction and penalties even when a facility files late in an attempt to remedy its past wrongs. Compliance with EPCRA is assured only if violations are penalized. Penalties are a powerful deterrent to non-compliance. *Cf., National Independent Coal Operators Assoc. v. Kleppe*, 423 U.S. 388, 408 (1976) (penalty provision of Coal Mine Health and Safety Act is essential to achieving Congress' intent to deter and prevent mining accidents and if operator faces no monetary penalty for violations, "he has little incentive to eliminate danger"); *Abercrombie v. Clarke*, 920 F.2d 1351, 1358-59 (7th Cir. 1990), *cert. denied*, 502 U.S. 809 (1991) (termination of bank's violation of Comptroller of Currency's cease and desist order did not eliminate need for assessment of penalties because penalties for past violations deter future violations).

As this Court has noted in the context of mootness:

> Both sides agree to the abstract proposition that voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot. . . . A controversy may remain to be settled in such circumstances . . ., *e.g.*, a dispute over the legality of the

> challenged practice . . . . *The defendant is free to return to his old ways.* This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. . . . For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right. . . . The courts have rightfully refused to grant defendants such a powerful weapon against public law enforcement.

United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953) (emphasis added; citations omitted). If a citizen under EPCRA is prohibited from seeking to redress past harms, a violator "is free to return to his old ways." This reading of EPCRA provides too powerful a weapon to the violator against enforcement. Moreover, citizen enforcement virtually would be eliminated because once the right to redress is gone, citizens will lack the incentive to notify and prosecute violators.

The Steel Company asserts that CBE currently suffers no present harm once the company filed its reports, albeit eight years late. That is simply not the case (*See, infra*, Point III (A), pp. 21-22). The implication of this assertion, however, is that a State would be unable to seek relief under Section 326(a) for reporting violations once a facility belatedly files. A State bringing a Section 313 enforcement action could be subject to a claim of mootness, for example, if a facility can eliminate the harm by filing past due reports once notice is received or suit is commenced.[6] Under The Steel Company's analysis, State

[6] As previously noted, States must sue as "persons" under Section 326(a) for violations of Section 313 and provide 60 days notice but may sue immediately for violations of Sections 311 and 312. Either way, suit would be barred under The Steel Company's analysis because once past due reports

(continued...)

Attorneys General would lack the ability to seek any punitive relief for Section 313 reporting violations once a facility quickly acts to file past due reports. This is simply not what Congress intended.

Rather, in passing Section 326, Congress sought to grant enforcement authority to a wide-ranging class of plaintiffs and thereby assure strict compliance with the statute. This class of plaintiffs includes EPA, State and local governments, SERCs, LEPCs and citizens. Each is entitled to seek penalties, injunctive relief and attorneys' fees for violations. 42 U.S.C. §§ 11045 and 11046(c). This type of broad-reaching enforcement is a necessary component of EPCRA's regulatory scheme, particularly because of the large number of facilities subject to its provisions.[7] EPA and the States simply lack adequate resources to investigate and prosecute all violations. This comprehensive enforcement scheme, which includes citizens, operates to protect the public from toxic chemical exposure and accidents precisely as Congress envisioned. *See*, 42 U.S.C. § 11046(a).

The Steel Company also asserts that the 60-day notice provision is primarily intended to give facilities the ability to come into compliance without facing a penalty. (*See*, petitioner *Steel Company* brief at p. 15.) To the contrary, when Section 326(d) and Section 326(e) are read together it is clear that the

[6](...continued)
are filed, enforcement cannot be sought because there is no "continuing violation" and the case is moot.

[7] The number of facilities nationwide that are subject to EPCRA is estimated to be close to 180,000. *See* EPA *Request for Public Comment on Small Business Administration Petition to Review Reporting Thresholds Under Community Right-to-Know Law*, 57 Fed. Reg. 48706, 48708 (Oct. 27, 1992).

primary purpose of the 60-day notice provision is to give EPA the opportunity to "diligently pursue" violations. *See*, Section 326(d) and (e), 42 U.S.C. § 11046(d) and (e). The 60-day notice requirement simply is not intended to provide an escape hatch for violators to attempt to "cure" past wrongs that continue to have an impact. A facility may of course use the 60-day notice period to file past due reports, but under EPCRA, past due filing does not operate to bring a facility into compliance since the risk of injury to the community is far-reaching. When facilities fail to report, thousands of people living in a community are placed at risk from unknown chemical exposure and from emergencies for which State and local responders are unprepared. Late filing simply does not eliminate this risk nor achieve EPCRA'S objectives of emergency preparedness and community right-to-know.

POINT III

CBE HAS STANDING TO SEEK REDRESS OF THE STEEL COMPANY'S EPCRA VIOLATIONS

CBE has standing to seek redress of The Steel Company's eight years of reporting violations. CBE has suffered a concrete injury caused by the company's non-compliance. CBE and its members have been deprived of crucial information which has affected their ability to assess the risk of exposure, to prepare for emergencies, and to participate in environmental regulatory decision-making in an effort to reduce chemicals in the community (JA 4-5). CBE's resources also have been adversely affected by having to research and investigate the absence of The Steel Company's reporting information. These resources otherwise could have been expended on activities such as citizen participation and education (JA 4-5). This injury is concrete and particularized, not conjectural or hypothetical. *Whitmore v.*

Arkansas, 495 U.S. 149, 155 (1990); *Warth v. Seldin*, 422 U.S. 490, 508 (1975).

CBE's injury is sufficiently set forth in its complaint and will be redressed by the injunctive and penalty relief and award of litigation costs authorized by Section 326(c), 42 U.S.C. § 11046(c). CBE's injury is related to a legally protected interest under EPCRA, that is, the right-to-know on an ongoing basis about the nature and quantity of chemicals present and released in the community. CBE therefore has presented a "case or controversy" and has proven its standing by alleging in the complaint an injury that (1) is fairly traceable to The Steel Company's unlawful conduct; and (2) is likely to be redressed by the requested relief. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Allen v. Wright*, 468 U.S. 737, 751 (1984).

This case comes to the Court in the "pleadings stage," in the context of a motion to dismiss. At this stage, general factual allegations of injury in CBE's complaint suffice to confer standing because the pleaded facts necessary to support an EPCRA claim are presumed to be true. *See, Bennett v. Spear*, ___ U.S. ___; 117 S.Ct. 1154, 1164; 137 L.Ed.2d 281, 299 (1997); *Lujan v. Defenders of Wildlife*, 504 U.S. at 561; *Gwaltney*, 484 U.S. at 65; *Warth v. Seldin*, 442 U.S. at 501; F.R.C.P. 12(b) and (c); 5A Wright & Miller *Federal Practice and Procedure* § 1368 (2d ed. 1990). Although the burden is on CBE to establish standing, *Lujan*, 504 U.S. at 561, that burden is a modest one at the pleadings stage. *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 256 (1994). The beginning point for the Court's analysis is CBE's complaint.

A. CBE's Complaint Sufficiently Sets Forth That It Has Suffered Injury-in-Fact Traceable to The Steel Company's EPCRA Violation

CBE's complaint asserts that both it and its members have suffered injury-in-fact as a result of The Steel Company's failure to submit chemical inventory and release forms by the specific dates set forth in Sections 312(a) and 313(a), 42 U.S.C. § 11022(a) and § 11023(a):

> CBE seeks, acquires, and uses data reported by facilities under EPCRA in its programmatic activities. Based on this data, CBE reports to its members and the public about storage and releases of toxic chemicals into the environment, advocates changes in environmental regulations and statutes, prepares reports for its members and the public, seeks the reduction of toxic chemicals and further seeks to promote the effective enforcement of environmental laws.

(JA 4-5). The complaint states that CBE's organizational purpose as a citizen's group is to "prevent environmental health threats through research, advocacy, public education and citizen involvement" (JA 4). Without The Steel Company's chemical inventory and release forms, CBE has been prejudiced in achieving its organizational goals of prevention, research, advocacy, public education and citizen involvement. Moreover, CBE's resources have been devoted to obtaining the chemical inventory and release information to which it is undisputedly entitled under EPCRA.

CBE's complaint also states that its members "reside, own property, engage in recreational activities, breathe the air, and/or

use areas" in the community in which The Steel Company's facility is located, and:

> CBE's members seek, acquire and use data reported by facilities under EPCRA to learn about toxic chemical releases, the use of hazardous substances in their communities, to plan emergency preparedness in the event of accidents, and to attempt to reduce the toxic chemicals in areas in which they live, work and visit. The safety, health, recreational, economic, aesthetic and environmental interest of CBE's members and their right to know about such releases have been, are being, and will be adversely affected by defendant's actions in failing to file timely and required reports under EPCRA.

(JA 5). Thus, CBE's complaint establishes injury of a legally protected interest by showing that the group and its members use in their activities the chemical inventory and release data reported under EPCRA (JA 4-5). Because The Steel Company has failed to file this data, CBE and its members cannot "plan emergency preparedness," or "attempt to reduce toxic chemicals in areas in which they live, work and visit" (JA 5).

CBE asserts that its members' interests "have been, are being, and will be adversely affected" by The Steel Company's failure to file chemical inventory and release forms (JA 5). The Steel Company's violations are "continuing," and have a "present adverse effect," *Lujan*, 504 U.S. at 564, in the sense that there have been eight years of unknown chemical releases and exposure and a lack of preparedness that continues to the present. The community has lacked the power of choice in avoiding chemical exposure from these releases, and even now is not likely to be prepared for emergencies that may occur at The Steel Company's facility. CBE is entitled to present evidence to the

district court that the Chicago LEPC emergency response plan prepared pursuant to Section 303, 42 U.S.C. § 11003, does not include The Steel Company's facility.[8] Emergency response plans contain detailed procedures for public notification, evacuation of affected areas, and necessary cleanup actions. A plan amendment to include an entire facility and all of its emergency contingencies can be tedious and expensive for an LEPC to undertake since it often lacks the resources to accomplish the task efficiently. This, too, constitutes a continuing harm from The Steel Company's eight years of violations that CBE is entitled to prove.

Continuing injury to CBE is also found in the absence of any Steel Company data in EPA's "Toxics Release Inventory National Report" which identifies chemical releases nationwide. EPA's report is widely relied upon by State and local environmental regulators in permitting and other decision-making, and by citizens in making choices regarding where they live and work. CBE's members continue to live with the State and local environmental decisions that have been made for eight years

[8] LEPCs were required to prepare emergency response plans encompassing all facilities within a community by October 1988. Section 303(a), 42 U.S.C. § 11003(a). Facilities were required to provide the LEPC with all information necessary, or requested, to develop the emergency plan. These plans must include at a minimum (1) identification of all the facilities within the community subject to EPCRA; (2) methods and procedures for facilities, emergency responders, and medical personnel to follow in the event of an emergency; (3) designation of emergency coordinators for the community and an emergency coordinator for the facility; (4) procedures for timely notification that a release has occurred to persons in the plan and to the public; (5) methods for determining when a release has occurred and the area or population likely to be affected; (6) descriptions of emergency equipment and emergency facilities available in the community; (7) evacuation plans and traffic routes; (8) training programs for local emergency response and medical personnel; and (9) methods and schedules for effectuating the emergency plan.

without the benefit of The Steel Company's Section 313 chemical release data.[9]

The Steel Company's eight years of unreported releases present a strong indication that future non-compliance will occur if the company is not penalized now for its prior violations. Without a clear incentive for The Steel Company to comply in the future, the company is likely to ignore EPCRA's reporting requirements again. CBE therefore has a "reasonable expectation that the wrong will be repeated" and is entitled to prove its allegation of future injury. *Gwaltney*, 484 U.S. at 66-67; *United States v. W.T. Grant*, 345 U.S. at 633.

B. CBE's Injury Will Be Redressed By the Relief Requested in the Complaint

CBE's injury will be redressed by the penalty and injunctive relief and costs requested in the complaint. CBE's complaint requests a prospective order (1) requiring The Steel Company to provide CBE with all reports for one year; and (2) authorizing CBE to inspect The Steel Company's facility and records to monitor compliance (JA 11). If this relief is granted, not only will compliance be assured but CBE will not be forced to expend its resources again to enforce compliance.

[9] For eight years, federal, State and local regulatory decision-making has not taken into account The Steel Company's releases. This kind of information is critical to environmental regulatory decision-making and to "the development of appropriate regulations, guidelines and standards." 42 U.S.C. § 11023(h). For example, the limitations and requirements set forth by environmental regulators in permits may take into account a company's total amount of releases annually. Additionally, environmental regulators and the facility itself have been deprived of the information necessary to determine whether the company should alter its operation or implement pollution prevention and best management practices in an effort to stem releases.

CBE also prays for an order requiring the payment of civil penalties. Penalties, if assessed, will punish for past non-compliance and will deter future non-compliance (JA 11).[10]

Finally, CBE requests an assessment of statutorily authorized litigation costs in connection with prosecuting the action (JA 11). An award of litigation costs will satisfy the significant resources CBE has been forced to expend in investigating, researching, and otherwise uncovering The Steel Company's violations. These costs will also redress the legal resources CBE has been forced to expend in its effort to enforce EPCRA compliance.

CBE has therefore satisfied the criteria for standing and the allegations in its complaint present a "case or controversy." U.S. Const., Art. III, § 2.

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[10] Civil penalties assessed under Section 326(a), 42 U.S.C. § 11046(a), are payable to the United States Treasury.

CONCLUSION

For the foregoing reasons, the determination of the court below should be affirmed.

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